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No. 94-209

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October Term, 1994

DAN MORALES, AS ATTORNEY GENERAL
FOR THE STATE OF TEXAS, AND
ALBERT ENDSLEY, AS TEXAS
CONSUMER CREDIT COMMISSIONER,

Petitioners,

v.

FIRST GIBRALTAR BANK, FSB,
AND BENEFICIAL TEXAS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSOLIDATED BRIEF OF STATE AMICUS CURIÆ IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER

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QUESTION PRESENTED BY TEXAS PETITIONERS

WHETHER TEXAS' CONSTITUTIONAL AND STATUTORY PROVISIONS PROTECTING HOMESTEADS FROM FORECLOSURE AND FORCED SALE ARE FEDERALLY PREEMPTED WHEN NEITHER FEDERAL STATUTES NOR REGULATIONS ADDRESS STATE HOMESTEAD PROVISIONS, AND WHEN ANY PREEMPTION IS DISCERNIBLE ONLY IN A DEPUTY GENERAL COUNSEL'S INTERPRETIVE LETTER, ISSUED WITHOUT OPPORTUNITY FOR NOTICE OR COMMENT.

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The states of Idaho, Indiana and Louisiana, each by and through its respective undersigned attorney general (the "States"), together respectfully submit this their consolidated brief as amicus curiæ in support of the petition of Dan Morales, as Attorney General for the State of Texas, and Albert Endsley, as Texas Consumer Credit Commissioner (together, "Texas") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The States respectfully submit this brief as of right pursuant to Rule 37.5 of the rules of this Court.

INTEREST OF AMICUS CURIAE[1]

Each of the States has a strong interest in the validity and enforceability of its own laws respecting real property, and particularly of its laws respecting the homes of its residents, any foreclosure thereon, or any forced sale thereof. Thus, each State has a strong interest in supporting the relief requested by Texas' petition for writ of certiorari and in opposing any impermissible attempt by any federal agency, and particularly by the federal Office of Thrift Administration ("OTS") as reflected in this case, extra-legally to encroach upon the States' respective domestic real and family property laws beyond the contemplation of the Supremacy Clause of the Constitution of the United States, *see* U.S. CONST., art. VI, cl. 2 (the "Supremacy Clause"), and beyond Congress' intent in its exercise of its powers under the Supremacy Clause.

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[1] Editorial Note: *See* S. Ct. R. 37.6 [sufficient for amicus briefs to set forth "the interest of the *amicus curiæ*, the argument, the summary of argument, and the conclusion," rather than all portions of briefs required of the parties].

SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case would upset the proper balance of state and national governmental powers by permitting a federal agency to preempt state family property laws through an informal retroactive gloss upon a vague and general federal agency regulation. The Court should grant review in this case, and upon consideration on the merits should reverse the decision below.

ARGUMENT[2]

Matters traditionally left to the states are presumed not preempted by federal law or regulation, and property law has been traditionally a matter of state law. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Butner v. United States*, 440 U.S. 48, 55 (1979). "It is beyond question that an essential state interest is at issue. . ." in state foreclosure laws. *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1764 (1994). None of the HOLA's statutory provisions suggest that Congress intended to preempt any state's substantive real estate laws, nor do they provide any guidance as to what substantive standards would replace the states' laws if they were preempted. *See* Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992) ("HOLA"). There is "no federal general common law." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2052-53 (1994), *quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, nothing in OTS' applicable regulations addresses the

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[2] The States adopt the summary and appendix in Texas' petition respecting applicable statutory and regulatory provisions and the Texas petition's Statement of the Case. Moreover, they join in Texas' statement of Reasons for Granting the Petition, but do not here burden the Court by repeating any portion of the contents of Texas' petition. *See* S. Ct. R. 37.1.

preemption of state substantive family property laws, much less the specific area of homestead exemptions.

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982), did hold that an OTS regulation effectively preempted California's due-on-sale clause law. However, there the Court construed a regulation that expressly dealt with such clauses. Here there are only the general statutory and regulatory provisions discussed in the Texas petition. In *de la Cuesta*, the regulations provided that due-on-sale clauses would be governed by the contract of the parties. Here, neither federal laws nor regulations provide the rules necessary to fill the gaps left by the assertedly preempted Texas laws. Thus, whether correctly decided or not, at least *de la Cuesta* left substantive rules for the public, the States and the federal government respecting due-on-sale clauses. By contrast, the Fifth Circuit's decision here leaves chaos and uncertainty, not just as to the rules to be used instead of Texas' homestead exemption, but respecting the validity of a broad range of laws of all states that could be construed as directly or indirectly addressing federal savings association "operations." *See* 12 C.F.R. § 545.33(f) (1994).

The court of appeals found an intent to preempt in a statute and in regulations that the court conceded to be vague on the issue of preemption, based on perceived clarification that the court found in an informal letter that the Fifth Circuit itself characterized as flawed. If this Court countenances the approach toward regulatory preemption adopted by the court of appeals, hardly any state law would be safe from preemption by informal and retroactive "clarification" of broad and vague agency regulations. Nothing could be more pernicious to the federal system or more detrimental to the States' proper exercise of their responsibilities to legislate for the health and safety of their citizens.

Therefore, this case strongly merits review by this Court.

CONCLUSION

Texas' petition for a writ of certiorari should be granted.

Respectfully submitted:

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